FILED
AUG 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1965

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PATRICIA THOMPSON
EDDIE THOMPSON, JR.

Petitioners

vs.

CITY OF COVINGTON, THOMAS EPPERSON, TODD FINAN, HENRY WARDEN, JOSEPH CONDIT, JOHN ELFERS, DOUGLAS STEPHENS, PEOPLES LIBERTY BANK, RICHARD NELSON, RALPH HAILE, AND UNNAMED PERSONS

Respondents

REPLY AND/OR SUPPLEMENTAL BRIEF

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REPLY AND/OR SUPPLEMENTAL BRIEF

Petitioners have not received a Reply or Response from Respondents, Joseph Condit[1], Douglas Stephens[1] or John Elfers. Thus it will be assumed they voluntarily waived their rights to file a Response to the Petition for Writ of Certiorari.

[1] Mrs. V. Lynne Schorering, Assistant Attorney General of Kentucky, wrote a letter on June 29, 1989, to Mr. Joseph Spaniol, Jr. purporting to waive Mr. Joseph Condit, City Solicitor for City of Covington, and Judge Stephens' rights to file a Response to the Writ of Certiorari. Petitioners strenuously object to the Office of the Attorney General of Kentucky and/or his Assistants representing litigants, wherein the State of Kentucky has no legal business or interest.

Mr. Stephen McMurtry, Counsel for Respondents, City of Covington, and Police Officers, Thomas Epperson, Todd Finan, Henry Warden filed a brief in opposition to Petition for Certiorari.

Mr. Richard Nelson, Pro Se, and counsel for Respondents Peoples Liberty Bank and Ralph Haile filed a Reply in opposition to Petition for Writ of Certiorari.

Because the briefs presented on behalf of these Respondents contain statements that are erroneous, inaccurate, irrelevant and/or unsupported by the record; and in order to obviate any resultant confusion, Petitioners feel compelled to file a Reply and/or Supplemental Brief.

Mr. McMurtry argues here;[2] that, (1) All of the actions were alleged to have occurred more than five (5) years prior to the filing of the (this) action, and (2) the Supreme Court should also be aware that Thompson's assertions of fact and causes of action have already been extensively litigated and the claims of excessive use of force against the police officers were tried by a jury. All of Thompson's causes of action were dismissed. U.S. District Court, Eastern District of Kentucky, Civil Action, 78-57 (78-70) and 79-40; affirmed by Sixth Circuit Court of Appeals 81-5784, (81-57) and 81-5785, Cert. Denied by U.S. Supreme Court 81-2122.[3]

Mr. Nelson argues there that: (1) there is no Federal Question presented so as to justify review by this Court; and (2) all issues alleged have been fully adjudicated . . . *Thompson* v. *Peoples Liberty Bank*, Kenton County Court No. 33430, Ken-

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[2] Mr. Condit and Mr. McMurtry neglected to file briefs in the Kentucky Supreme Court on behalf of Judge Lape, who appointed the honorable Jack Arnold, as special judge, in the Kenton Circuit Court. See *Thompson* v. *Honorable Raymond E. Lape, Jr.*, Supreme Court No. 88-2028.

[3] This is the same case Mr. Nelson refers to in his Reply of Respondent, bottom of page 6 as *Patricia and Eddie Thompson, Jr.* v. *Richard Nelson, et al.*, (No Fed. Supp. published opinion) 709 F 2d 1509, unpublished opinion), (Sixth Circuit), Cert. Denied, (82-2122), 464 U.S. 829, 104 S. Ct. 104, 78 L. Ed. 2d 108.

tucky Court of Appeals No. 79-CA-1456-MR,[4] Cert. Denied 80-1358, 4/20/81, *Thompson* v. *Nelson*, U.S. District Court 78-57, *Thompson* v. *Sluckich, et al.*, 78-70, *Thompson* v. *Peoples Liberty Bank, et al.*, 79-40, Cert. Denied, 464 U.S. 829.

Neither Mr. McMurtry or Mr. Nelson, Counsel for Respondents make references to any pleadings filed on behalf of Respondents in the trial court or cite any case law to support their position before this Court.

Both Mr. McMurtry and Mr. Nelson have personsal knowledge that these claims and issues were brought in Federal District Court; Nos. 78-57, 78-70, 79-40 where all claims and issues were consolidated, and Mr. Nelson admitted, at a pre-trial conference attended by Mr. McMurtry, inter alia, that (1) Peoples Liberty Bank lost the possessory action. *Thompson* v. *Peoples Liberty Bank*, Kentucky Court of

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[4] (451 U.S. 909) In the appendix of this Petition filed by Petitioners in this Court is a copy of: (1) the lease Peoples Liberty Bank signed with Bernard Smith and James Liles, City of Covington Police Officers, to lease petitioners' home to the police officer to assist Peoples Liberty Bank in forcibly taking Petitioners' home. (App. P. 18a) (2) interrogatories where Mr. Nelson admitted he (Nelson) and Peoples Liberty Bank hired at least seven (7) police officers at five (5) dollars an hour, including officer Liles and Smith, to assist the Bank in taking Petitioners' home and personal possessions. (App. P. 20a), (3) a letter from Mr. Nelson returning Petitioners' mortgage payment for July, August, and September. The only months Petitioners owed. (App. P. 21a) (The Bank would not accept Petitioners' mortgage payment in July, August, or September, so Petitioners mailed the payments in in October) and (4) A copy of the writ of possession signed by Judge Goodenough on April 12, 1978. (Three (3) days before three (3) City of Covington police officers beat and threatened to put Petitioner Eddie in the river) One of the officers was Todd Finan, whom Mr. Nelson hired and paid five (5) dollars an hour to stay at Petitioners' home and assist the bank in forcibly taking Petitioners' home and personal possessions. The Writ of Possession signed by Judge Goodenough on April 12, 1978 was executed on July 19, 1978, the day the bank leased Petitioners' home to the police officers. The Writ of Possession required the chief to make a return ten (10) days after the judge signed it on April 12, 1978, which would have been April 22, 1978. Petitioners had no notice of the Writ of Possession signed by Judge Goodenough on April 12, 1978.

Appeals No. 79-CA-1456-MR, and (2) that he (Nelson) and Peoples Liberty Bank hired City of Covington Police Officers[5] at a rate of five (5) dollars an hour, and a criminal attorney to forcibly take possession of Petitioners' home and personal possessions.

Mr. McMurtry argues here that, ". . . the claims of excessive force against police officers were tried by a jury, is totally untrue.

At the pre-trial conference, transcript Page 130, Mr. Nelson said, ". . . I respectfully request that after the Court rules upon what is being treated as a motion for summary judgment, if they should be overruled, we would like . . . myself Pro Se and my clients . . . to have as speedy trial as possible, in order to resolve this matter once and for all."

The Court said, "If you don't want it treated as a summary judgment, I'll be glad to . . ."

Mr. Nelson replied, "No, I want it treated that way, your Honor, but in the event that the Court does not sustain that motion . . ."

The Court said, "I will. Just don't ask for something sooner than you want, because if I have a week open up, I'll set it down very quickly."

In dismissing, the Court said, "Alright. I'm going to take the record and I'm going to consider the motions to dismiss that have been filed as motions for summary judgment, as supplemented by these court records that I've ordered filed." "Mr. Thompson, I'm going to give you thirty days to file in this record affidavits . . . ." Pre-trial transcript Page 108. Mr. Nelson never filed the records.[6]

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[5] Of the seven (7) City of Covington Police Officers the Bank and Mr. Nelson admitted hiring to take Petitioners' home and personal possessions, at least one (1) of them was involved in the beating and threatening of Petitioner Eddie's life.

[6] 709 F 2d 1509, unpublished decision, Cert. Denied 2122, 464 U.S. 829. In the Petition for Certiorari, Appendix page 28a is a copy of an affidavit

In *Costello* v. *United States*, 365 U.S. 265, 266, the U.S. Supreme Court held that, "Dismissal of first proceeding for failure to file an affidavit of good cause was a dismissal 'for lack of jurisdiction,' within the meaning of Rule 41 (b) of the Federal Rules of Civil Procedure." Therefore, the failure of the District Court to specify that the Dismissal was "without prejudice" to the filing of a new complaint did not bar the second . . . proceeding under that Rule.

In order to rely on doctrine of res judicata, defendant in subsequent action would have to prove that issues invoked in subsequent action was present and actually determined in prior action, in view of fact that such did not appear from the record. *Ingram* v. *Turner*, 301 S.W. 2d 436 (KY CA 1957).

Party asserting application of doctrine of collateral estoppel by judgment must plead and prove that the question presented in the instant action was actually litigated and determined by prior action. *Whittenberg Eng. & Const. Co.* v. *Liberty Mut. Ins. Co.*, 390 S.W. 2d 877 (KY CA 1957).

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filed by Mr. Nelson claiming the records the Federal Judge had ordered him to file could not be made available at the present time. Mr. Nelson did not serve a copy of his Affidavit upon Petitioners as required by Cr 5.03. Obviously, Petitioners were unable to file the necessary affidavits. It is also clear that there could be no trial involving the police officers with their employer (Mr. Nelson and Peoples Liberty Bank).

CONCLUSION

It is well settled that "The doctrine of Res Judicata" would prevent Petitioners' claims from being adjudicated on the merits in both Courts. Once on the merits is enough.

The U.S. Supreme Court said in *Angel* v. *Bullington*, 330 U.S. 183, 188, 91 L. Ed. 832, 836, discussing the subordination to the requirements of the Constitution of the power of a State to withdraw jurisidiction from its Courts:

"The power of a State to determine the limits of the jurisdiction of its Courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution." . . . (cite omitted). The Contract Clause, the full faith and Credit clause, the privileges or immunities Clause, all fetter the freedom of a State to deny access to its Court however much it may regard such withdrawal of jurisdiction, "the adjective law of the State," or to exercise of its right to regulate "the practice and procedure of its Courts." . . . (cite omitted) A State "cannot escape its constitutional obligation by the simple devise of denying jurisdiction in such cases to Courts otherwise competent" . . . (cites omitted). "Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." But, whether the claims are based on a Federal right or merely of local concern is itself a federal question on which this Court, and not (the Kentucky Court of Appeals), has the last say. That Court could not put a Federal claim aside, as though it was not in litigation, by the tailismanic word "jurisdiction." When an asserted Federal Right is Denied, "the sufficiency of the grounds of denial are for this Court" . . . (cite omitted).

Mr. McMurtry's and/or Mr. Nelson's contentions that Petitioners' Petition is frivolous, presents no Federal question, and/or has been previously fully adjudicated in both State and Federal Court, cannot be accepted in good faith.

Respondents are estopped from denying the allegation in the complaint, because of the Federal Suit. *Thompson* v. *Nelson* 78-57, *Thompson* v. *Sluckich*, 78-70, *Thompson* v. *Peoples Liberty Bank*, 79-40.

Wherefore, Petitioners pray this court reverse and remand with instructions that damages be determined by a jury, and Petitioners recover all costs expended, plus reasonable attorney's fee.

_____

Patricia Thompson

_____

Eddie Thompson, Jr.

AFFIDAVIT OF PROOF OF SERVICE

Comes now Patricia and Eddie Thompson, Jr., Petitioners herein, first being duly cautioned and sworn and state as follows:

On August ____, 1989, I deposited 3 copies of the instant Reply and/or Supplemental Brief, in duly addressed envelopes, with first class postage prepaid, to Mr. Stephen T. McMurtry, 308 Greenup Street, Covington, KY 41011, Mr. Martin Huelsman, 88 Thompson Ave., Fort Mitchell, KY 41017, Mr. Richard Nelson, 11 West 6th Street, P.O. Box 1209, Covington, KY 41011, Mr. Frederic Cowan, Attorney General, and Ms. Patricia Todd Thomas, Ms. V. Lynne Schroering, Assistant Attorney General, Capitol Building, Frankfort, KY 40601, Mr. John Scott, 403 Wapping Street, Frankfort, KY 40601, Mrs. Karla Katakis, Chief Legal Counsel, Administrative Office of the Court, 403 Wapping Street, Frankfort, KY 40601, The Solicitor General, Department of Justice, Washington, D.C. 20530.

_____

Patricia Thompson

_____

Eddie Thompson, Jr.

Subscribed and sworn to before me this ____ day of August 1989.

_____ _____

My Commission expires NOTARY